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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

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Frans Nooren Afdichtingssystemen BV, et al., §

Plaintiffs, §

versus §

Stopaq Amcorr Inc., et al., §

Defendants. §

Civil Action H-10-3150

## Opinion on Patent Infringement

### 1. Introduction.

Frans Nooren Afdichtingssystemen B.V. and Stopaq B.V. have sued Amcorr Products and Services, Inc., and Dolphin Sealants, LLC, for patent and trademark infringement. The parties have moved for summary judgment on patent infringement. Amcorr is correct.

### 2. Background.

Frans Nooren patented a sealant for protecting underground equipment, such as tanks, pipes, and cables, from moisture and corrosion. The sealant consists of a polymer for its adhesive and sealing properties and a filler, which effects the composition's viscosity. The filler enters and forms to the voids in the surfaces to which the sealant is applied.

A variety of materials can serve as filler.<sup>1</sup> Frans Nooren's patent claims that its sealant includes "a filler comprising a plurality of fractions each comprising different size particles, and wherein said different fractions have different particle size distributions."<sup>2</sup> This is similar to layering basketballs, baseballs, and golf balls within a box to fill the space as much as possible.

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<sup>1</sup> U.S. Patent No. 5,898,044 col.3 ll.55-66 (filed Apr. 27, 1999).

<sup>2</sup> 044 Patent, col.8 ll.11-19.

Amcorr's sealants have three components – polybutene, polypropylene, and a filler of either calcium carbonate or aluminum trihydrate.

The issues are whether (a) the patent is limited to a mixture of multiple fractions of the same material, (b) Amcorr's fillers contain more than one fraction, and (c) polypropylene constitutes a second filler in Amcorr's products.

3. *Single Material, Multiple Fractions.*

Nooren's patent is limited to a mixture of multiple fractions from one material, each fraction having a different particle size distribution.

Using a filler made from mixing two or more materials is outside the scope of the patent. The patent claims "a filler" in the singular sense. Nooren could not claim multiple fillers with multiple fractions. During the process of obtaining the patent, the examiner rejected the claims and requested amendments, citing the Nakano patent and other prior art indicating that polymer-based coatings with two fillers have already been patented.<sup>3</sup> Instead of basketballs and golf balls, Nooren's patent covers a mixture of adult and child-sized baseballs. Nooren's patent limits its infringement claims to single-material mixtures.

The filler must include multiple fractions, each with a distinct particle size distribution. For the filler limitation to be meaningful, each fraction must have both a discrete range of particle sizes as well as a high number of particles in that range. Without this threshold, any variation in size would be a different fraction, and infringement would be unavoidable.

On a size-distribution graph, a different fraction would be represented by a distinct peak. A minor bump does not distinguish a separate fraction. A graph representing multiple fractions would require at least a bimodal distribution with two or more predominate peaks.

4. *Amcorr's Fillers.*

Amcorr's filler materials – calcium carbonate and aluminum trihydrate – have unimodal particle distributions and are not covered by Nooren's patent. The distribution graph for each filler has a single peak. The minor protrusions and changes in slope are not peaks. They show multiple particle sizes but not multiple fractions.

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<sup>3</sup> U.S. Patent No. 5,221,575 col.6 ll.48-57 (filed Jun. 22, 1993).

5. *Polypropylene.*

The polypropylene in Amcorr's products is not a filler. Some materials can be both a polymers or a filler. Listing polypropylene as a possible filler does not limit its use for a different function. There are pies with chocolate filling and pies with chocolate crust; both are distinct and independent uses for the same ingredient. Polypropylene mixes with polybutene to form a homogenous polymer mixture; it is not a filler. Even if it were, the patent does not cover fillers mixed from multiple materials. Thus, polypropylene does not infringe.

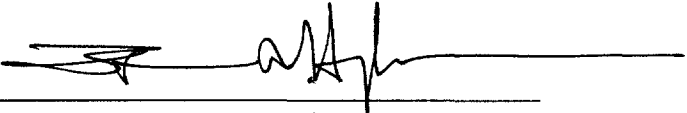
6. *Indirect Infringement.*

Frans Nooren alleges induced infringement by Amcorr. However, inducement first requires direct infringement.<sup>4</sup> Since the products do not directly infringe, Amcorr did not induce infringement.

7. *Conclusion.*

Amcorr Products and Services, Inc., and Dolphin Sealants, LLC, do not infringe the patent of Frans Nooren Afdichtingssystemen B.V. and Stopaq B.V. The patent is limited to multi-fraction mixtures created from a single material. Amcorr uses a single material with a unimodal particle size distribution – a single fraction. Polypropylene is not a filler, but even if it were, it would not infringe because a mixed-material filler is outside the patent's scope.

Signed on January 4, 2013, at Houston, Texas.

  
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Lynn N. Hughes  
United States District Judge

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<sup>4</sup> *Minnesota Min. & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304-05 (Fed. Cir. 2002).